APPEAL NO. 93315

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp 1993). On November 13, 1992, a contested case hearing was held in (city), Texas, with (hearing officer), presiding. He determined that claimant was injured in the course and scope of employment on (date of injury), when he slipped while carrying rebar and on the same day aggravated his injury by continuing to work using a sledge hammer; he also found that the injury was timely reported. That decision was considered by the Appeals Panel as Texas Workers' Compensation Commission Appeal No. 92700, decided February 4, 1993, which reversed and remanded because not all the testimony was available on the audio tape record provided on appeal. Upon remand, by decision dated March 24, 1993, the hearing officer reports that the parties at a pre-hearing conference agreed as to whose testimony was missing. All parties agreed to a summary of the missing testimony and such was provided. The hearing officer then reviewed the evidence, incorporated his previous decision into the present one, and adopted the decision previously made. Appellant (carrier) asserts error only as to the finding that the respondent (claimant) was injured in the course and scope of employment because medical evidence did not show a causal connection. No other issue is raised on appeal. Claimant reasserted the reply it made in the first appeal of the case.

DECISION

Finding that the decision and order are sufficiently supported by the evidence, we affirm.

The appeals panel observes that the summary of evidence provided to complete the record does not address the testimony which Appeal No. 92700 questioned; since the parties were aware of the question of an incomplete record raised through Appeal No. 92700 when they agreed to the summary now provided and since there is no issue raised on appeal as to whether there is a complete record for review, the condition of the record requires no further discussion; the asserted issue on appeal will be considered.

(Mr. A) testified that he is a plumbing contractor and that claimant had worked for him for approximately nine months when "the job ran out." He characterized claimant as a hard worker, who was truthful, and who had no injury when he left his employ just before taking his current employment.

Claimant testified that he took his current job as a laborer in order to get the position of forklift operator that was also open - the forklift position required taking a test, so claimant worked as a laborer at first. As part of the orientation as a new employee at (employer), claimant had to take a drug test. It was negative. (Claimant acknowledged that he had used drugs in the past but stated that he had used none for the past 1½ years.) Claimant described June 8th as his first day on the job, but it was too wet to work. On June 9th he reported and discussed the forklift test but was eventually released to go

home. On June 10th, it was still too wet to use equipment, but he was able to work as a laborer helping some carpenters. The area was muddy and he was carrying four pieces of rebar (each one of which weighed approximately 25 pounds) on his shoulder when he slipped while walking down an incline. As he fell down, the rebar was against his neck. He told (OD) that he did something to his neck and OD told him to tell (BQ), the supervisor. Claimant said he kept working because he wanted the job; he got some help and switched the way he used the sledge hammer to primarily use his left hand. When BQ told him he had passed the Bobcat test, he told BQ his fall and use of the sledge had hurt his neck. He further stated that (MP), another employee, saw him at lunch and commented to him that he (MP) had seen claimant fall.

Claimant came to work the next day, June 11th. He stated he was able to do so because his wife just had a baby, and he took some of her Tylenol 4 (Tylenol 4 is a controlled drug which contains codeine) and also because he would have an easier job using the forklift. He also worked on June 12th, which was a Friday. He said he got to a point where he could not work and could not straighten his neck, and he told BQ this. On Sunday, June 14th, his neck was very bad. His father took him to a clinic where he saw a (Dr. A), who took an x-ray and wrote a work release notice good until Wednesday, June 17th. Claimant took the work release note in on Monday June 15th and said that BQ told him to fill out a termination paper first before a workers' compensation notice. Claimant left and saw a chiropractor that day. He said that a nurse from the clinic called and told him that he had a broken bone in his neck. (The date is not clear, but from other parts of the testimony, this call may have been on June 18th or June 19th.) At some point he saw Dr. A and was given a collar to wear. On June 23rd he saw Dr. F) who said, claimant states, that there may be a fracture, but he did not think so. Dr. F gave claimant pain pills. Claimant said the chiropractor also said he had a fracture. Claimant added that Dr. F never x-rayed him on followup, but gave him more pills.

The sequence of events is not completely clear, but claimant testified that he did get an MRI, lost 60 pounds, and was taking pain pills and pain shots. At some point he became paralyzed and an ambulance took him to an emergency room. He asked to see another doctor, but the personnel there called the doctor he had seen, Dr. F, who, claimant said, told them to give him pain shots and send him home. When claimant had the MRI, the doctor, Dr. Y, who performed it asked him how long he had had that condition and then called Dr. F and "chewed him out." Claimant had surgery two days later. Claimant said that Dr. F, who did the surgery, said that the fracture was not the same as what he had seen earlier; he also said that the neck problem was drug related. Claimant characterized Dr. F as being "worried" at this point.

Medical records offered by both parties were very sparse and no records of the surgery were offered. Dr. A's one page record shows that claimant came to him on June 14th and reported a neck injury from using a sledge hammer "on Tuesday" (the Tuesday

before June 14th was June 9, 1992.) Dr. A noted that an x-ray was taken. Chiropractic records show claimant was seen on June 15th and thereafter. Dr. F on June 23rd reports seeing claimant and says that x-ray shows compression of C6-7. On June 29th, Dr. F states that an MRI is scheduled. On a date that is not clear in July 1992, Dr. F's record shows that he talked with claimant's father who reported claimant's arms being numb. Dr. F recorded that he mentioned the use of an ambulance and later got a call from an emergency room. He also writes that he changed the date for having an MRI done. In a deposition Dr. F gave the carrier, he states that in his opinion claimant had a bone infection in his neck; in his opinion the bone infection was caused by drug use; and he said he had no opinion as to whether the job could have caused the infection. (No question was asked and no opinion was offered as to whether such bone infection, if present, caused claimant's problems, which may have included a broken neck bone and surgery.)

Evidence was introduced by claimant's aunt that she had talked to MP shortly after the claimant's surgery at the hospital and that he told her too that he had witnessed the accident. MP denied making that statement. Claimant introduced a note which he said MP had left at his door. It said:

I'm sorry that I lied to you, but when you asked me to do this I didn't think this thing
out. T please believe me that I didn't me (sic) to lie to you, but it was possible that I could have lost my job and I just couldn't do that. I'm sorry.

M

MP testified that claimant had asked him to lie for him, but he changed his mind and decided not to lie.

Claimant also introduced a call that came to him on Monday, June 15th from BQ that was recorded on an answering machine because claimant was not at home. BQ stated that claimant needed to call him so that they could all be in the "same boat" as to the crick in claimant's neck.

OD testified that he worked for employer too. He does not recall claimant telling him on June 10th of an injury, but does recall that claimant complained to him on Saturday June 13th, saying that he had swung a sledge hammer and gotten a crick in his neck. While OD did not say that claimant said he was swinging the sledge hammer at work and that such swinging caused pain in his neck such as one would feel with a crick, he did testify that claimant's neck was swollen and it was not swollen when he first went to work there. He opined that it became swollen between going to work and the following Saturday, June 13th.

The carrier asserts that the decision is not supported by sufficient evidence because the only medical evidence indicates that claimant had a bone infection caused by drugs. Carrier states that reasonable medical probability is necessary to show the cause of the injury and cites Parker v. Employers Mut. Liability Ins. Co. of Wis., 440 S.W.2d 43 (Tex. 1969) and Ins. Co. of North America v. Myers, 411 S.W.2d 710 (Tex. 1966). Parker and Myers involved radiation as a cause of cancer and whether an existing tumor was accelerated as to its malignancy, respectively. In addition, the Myers question was discussed after the jury found that the patient died of cancer, whereas, in the case on appeal, the hearing officer, as finder of fact, has made no comparable finding that infection was the cause of claimant's injury or even that infection was a factor in the injury.

The appeals panel recently revisited Parker and other cases regarding the necessity to have medical evidence as a basis to find causation. *See* Texas Workers' Compensation Commission Appeal No. 93265, decided May 20, 1993. In that decision, TEIA v. Thompson, 610 S.W.2d 208 (Tex. Civ. App.-Houston [1st Dist] 1980, writ ref'd n.r.e.) was discussed. That case involved an assertion of injury from a blast of pressurized sand reaching the lungs and a defense that Thompson had existing lung disease. The court referred to Parker and said:

> But the exception is a narrow one and is not to be applied unless the facts come strictly within it . . . . It does not apply to cases where the claimant contends that he has no disease or cancer, but only that he suffered an injury to a specific part of his body which immediately and directly caused a disability . . . .

Appeal No. 93265 also referred to the often quoted test for cause in an injury case - "the lay proof of the sequence of events, his objective symptoms of pain and discomfort fortified by evidence of timely treatment, produced a logical, traceable connection between the accident and the result."

The hearing officer found that claimant was injured when he slipped carrying rebar and aggravated that injury by using a sledge hammer. The evidence was sufficient to support that finding based on claimant's testimony. In addition, the hearing officer could weigh the testimony of MP, claimant, and the note signed by "M" and conclude that MP saw claimant's fall on June 10th. He could also believe claimant when he said he told his supervisor BQ the day of the injury; BQ's own recorded words show he knew of some assertion by claimant as to his condition within five days. While claimant did not see a doctor that day, he testified that he treated the injury with a significant pain killing drug and then saw a doctor within four days. OD testified that claimant's neck was swollen between the time he started work (there was no assertion that claimant did any work prior to June 10th) and Saturday, June 13th. Finally, the injury was found to be significant enough to require surgery. The evidence sufficiently complies with the test as to

sequence of events, objective symptoms and timely treatment producing a logical, traceable connection which was a determination for the hearing officer to make as finder of fact. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34 (e) of the 1989 Act.

The Appeals Panel will not overturn the hearing officer on a decision grounded in a factual determination unless the decision is against the great weight and preponderance of the evidence. As stated, the decision and order are not against the great weight and preponderance of the evidence and are affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

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Thomas A. Knapp
Appeals Judge